No. 83-18

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

DUN & BRADSTREET, INC.,

Petitioner,

v.

GREENMOSS BUILDERS, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT GREENMOSS BUILDERS, INC.

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Sunward Corporation respectfully moves for leave to file the accompanying Brief Amicus Curiae. The consent of Respondent Greenmoss Builders, Inc., has been obtained. The consent of Petitioner Dun & Bradstreet, Inc. was requested but refused.

The interest of Sunward Corporation in this case arises from its position as a party to a case presently pending in the United States Court of Appeals for the Tenth Circuit involving the issue of whether the limitations on awards of presumed damages for libel set forth in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), apply to nonmedia defendants. *Sunward Corp.* v. *Dun & Bradstreet, Inc., appeal docketed*, No. 83-2644 (10th Cir. Dec. 23, 1983).

In the instant case, the Vermont Supreme Court held that Dun & Bradstreet was not entitled to a common law qualified privilege (although the trial court had instructed the jury regarding the privilege), and that *Gertz* does not

prohibit presumed and punitive damages when a private plaintiff sues a nonmedia defendant. While the *Sunward* case to which Amicus Curiae is a party presents the same issue regarding *Gertz*, the case differs in two critical respects from the case before the Court: (1) the trial court in *Sunward* followed the majority rule and extended a common law qualified privilege to the credit reports of Dun & Bradstreet, and (2) only presumed, and not punitive, damages were awarded. Because the Vermont Supreme Court refused to extend a common law privilege to Dun & Bradstreet, and the bulk of the damages awarded were punitives, the parties in the case before the Court may not fully address either the state interest in allowing presumed damages, or the common law privilege accorded credit reporting agencies. The following brief focuses on these two aspects of the law of libel, which could affect the Court's disposition of the issue presented for review.

Respectfully submitted,

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SUMMARY OF ARGUMENT

Presumed damages in business libel situations serve the legitimate state interest of compensating defamed plaintiffs. The majority of states, however, protect Dun & Bradstreet from liability, and accordingly from presumed damages, by extending a qualified privilege to credit reports. Thus, a plaintiff cannot recover presumed damages except in instances when Dun & Bradstreet has acted recklessly or maliciously. Although this culpability requirement differs from the reckless disregard standard defined in the Court's decisions in *New York Times*, *St. Amant*, and *Gertz*, it adequately protects Dun & Bradstreet from self-censorship because of the characteristics of the type of commercial speech in which Dun & Bradstreet engages.

ARGUMENT

I. Background — The Media/Nonmedia Distinction Is Not Dispositive of This Case.

In *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), the Court recognized that the states have a legitimate interest in compensating plaintiffs for harm caused by defamatory speech. This interest, however, must be balanced against the concerns embodied in the First Amendment. After examining these concerns, the Court held in *Gertz* that the states could not allow presumed or punitive damages, at least in the absence of knowledge of falsity or reckless disregard for the truth by the defendant. *Id.* at 349. It was unclear whether the latter holding was a uniform pronouncement applicable to both media and nonmedia defamation cases.[1] The Court has since suggested on at least two occasions that the applicability of *Gertz* to nonmedia cases is an open question. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 133 n.16 (1979); *Babbit* v. *United Farm Workers National Union*, 442 U.S. 289, 309 n.16 (1979). *See also Miskovsky* v. *Oklahoma Publishing Co.*, 51 U.S.L.W. 3284 (U.S. Oct. 12, 1982) (Rehnquist, J., dissenting from denial of cert.) (*Gertz* did not "wipe out" the common law of libel).

State and lower federal courts are in conflict on the application of *Gertz*. Some have limited *Gertz* to cases involving media defendants, *see, e.g., Denny* v. *Metz*, 106 Wis.2d 636, 318 N.W.2d 141, *cert. denied*, 103 S. Ct. 179 (1982); *Rowe* v. *Metz*, 195 Colo. 424, 579 P.2d 83 (1978); others have extended its protection to all defendants, *see, e.g., Beneficial Management Corp.* v. *Evans*, 421 So.2d 92 (Ala. 1982); *DeCarvalho* v.

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1. *Gertz* involved a "media" defendant and the opinion repeatedly used media references. *See, e.g.*, 418 U.S. at 340 ("publisher or broadcaster"), 341 ("news media"), 342 ("press"), 345 ("communications media"). The Court's opinion used such terms as "publisher or broadcaster" and "news media" over 15 times. *See* Note, *Mediaocracy and Mistrust: Extending* New York Times *Defamation Protection to Nonmedia Defendants*, 95 Harv.L.Rev. 1876, 1877 n.9 (1982).

daSilva, 414 A.2d 806 (R.I. 1980). As Dun & Bradstreet stresses in its Brief, commentators have both decried this further complication to the "chaotic" law of defamation and criticized what they view as a baseless distinction between the "press" and the "rest of us." *See, e.g.*, Christie, *Injury to Reputation and the Constitution: Confusion and Conflicting Approaches*, 75 Mich.L.Rev. 43, 58 (1976). They have argued that consistency and fairness required uniform application of *Gertz*. *But see* Stewart, *Or Of The Press*, 26 Hastings L.J. 631 (1975) (asserting that *New York Times* and its progeny are based on the press clause). *See also* Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455 (1983) (challenging historical view that speech and press clauses are equivalent or redundant).

Dun & Bradstreet is a peculiar standard bearer to be advancing the cause of the commentators. First, the alleged chaos in state defamation law does not apply to Dun & Bradstreet. In fact, the law of defamation is rather consistent regarding credit reporting agencies.[2] Congress has largely preempted the common law concerning consumer reporting agencies, 15 U.S.C. §§ 1681 to 1681t (1976),[3] and the majority rule recognizes a common law qualified privilege for commercial reporters such as Dun & Bradstreet.

On the surface, the argument that the First Amendment should not play favorites presents a more difficult issue. In its

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2. Even if defamation law for credit reporting agencies were inconsistent, this alone would not mandate an across-the-board application of the First Amendment. The possibility of different legal standards among the states is inherent in our federal system. *Gertz* recognized this basic tenet of federalism. 418 U.S. at 345-46.

3. Acceptance of Dun & Bradstreet's argument would raise questions about the constitutionality of sections of the Fair Credit Reporting Act ("FCRA"). If no distinctions can be drawn between the media and credit agencies, the requirements imposed by the FCRA would appear to be unconstitutional restraints on free speech. Even limiting the question to presumed and punitive damages causes concern. The FCRA allows punitive damages for "willfull" noncompliance with its requirements. 15 U.S.C. § 1681n. A credit agency might thus be liable for punitive damages based

Brief, Dun & Bradstreet exploits the many problems that might arise from a media/nonmedia distinction. The hard questions Dun & Bradstreet poses, however, are inapposite here. Regardless of how one distinguishes between the media and nonmedia, it is clear that Dun & Bradstreet belongs in the latter category. Indeed, Dun & Bradstreet has never claimed otherwise. More importantly, Dun & Bradstreet's broad-based argument has little to do with its credit reports. These reports are not part of the "robust debate of public issues," which inspired *New York Times* v. *Sullivan* and its progeny.[4]

To resolve this case, the Court need not decide whether the Constitution should distinguish between the media and nonmedia. Instead, the critical inquiry is whether, in light of the state interest in compensating defamed plaintiffs, presumed damages impermissibly cause self-censorship of a specific type of commercial speech. The answer to that question requires an examination of the following factors: (1) the state

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upon a culpability finding that differs from the Court's "actual malice" standard. *See generally Collins* v. *Retail Credit Co.*, 410 F. Supp. 924 (E.D. Mich. 1976). In *Collins*, the court found willful noncompliance with the Act, as well as a common law libel. However, the court's findings are based on the credit agency's conduct; no mention is made of knowledge of falsity or subjective doubts about the truth of the report. *See also Rasor* v. *Retail Credit Co.*, 87 Wash.2d 516, 554 P. 2d 1041, 1049 (1976) (regarding preemption of common law, "the intent of Congress in framing the Fair Credit Reporting Act was simply to limit recovery for presumed injury to instances of "malice and willful intent" . . .). Common law "malice" or "willful intent" may differ substantially from the *New York Times/St. Amant* protection requested by Dun & Bradstreet. *See* Part III *infra*.

4. Dun & Bradstreet defends this aspect of its reports, which was emphasized by the Vermont Supreme Court, by arguing that content-based distinctions have been condemned by the Court. This not only ignores the Court's commercial speech cases, discussed in Part IV *infra*, it also overlooks the concerns that underlay *Gertz'* rejection of *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971). A credit report is a credit report. In evaluating these reports, courts would not be called upon to make ad hoc determinations of what is of "public interest" or "relevant to self-government." *See Gertz*, 418 U.S. at 346.

interest in allowing presumed damages, (2) the level of protection provided by the common law, and (3) the specific nature of the speech engaged in by Dun & Bradstreet. Analysis of these factors reveals that the concerns announced in *Gertz* regarding presumed damages are inapplicable to libelous Dun & Bradstreet credit reports. The common law provides adequate protection for these reports and therefore this Court should not intrude on state law via the Constitution.[5]

II. The States Have A Legitimate Interest in Preserving The Doctrine of Presumed Damages.

Gertz recognized that the states have a legitimate interest in providing compensation to defamed plaintiffs. 418 U.S. at 348. The doctrine of presumed damages is a method for achieving this interest. The Colorado Supreme Court has cogently stated the basis for the doctrine:

> The rationale for this rule derived from the difficulty of proving damages in [slander per se situations]. This is particularly true where, as here, the defamatory remarks are related to the conduct of an individual's business affairs. It is the rare case in which a slander will destroy business profits in such a way that the loss can be directly traced to the slanderous remarks.

Rowe v. *Metz*, 195 Colo. 424, 579 P.2d 83, 84 (1978).

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5. A noted commentator discusses First Amendment methodology in terms of a distinction between the scope of protection provided by the First Amendment, contrasted with the level of protection provided. Shriffin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. Rev. 915 (1978). A ruling that *Gertz* applies only to the media would arguably be a ruling based on the scope of the First Amendment. The position of Amicus Curiae is a "level of protection" argument. In essence, its position is that, even if the Constitution protects Dun & Bradstreet reports, the protection provided by the common law equals or exceeds that required by the Constitution.

Nowhere is this rationale more applicable than in situations involving Dun & Bradstreet reports. It may be extremely difficult for a plaintiff to link directly the Dun & Bradstreet report either to a decline in sales or to a loss of potential business.

> The harm resulting from an injury to reputation is difficult to demonstrate both because it may involve subtle differences in the conduct of the recipients toward the plaintiff and because the recipients, the only witnesses able to establish the necessary casual connection, may be reluctant to testify that the publication affected their relationship with the plaintiff.

Note, *Developments in the Law — Defamation*, 69 Harv.L. Rev. 875, 891-92 (1956) (hereinafter cited as *Developments*). Not only are business people naturally reticent in revealing the basis for a decision, but Dun & Bradstreet contributes to this silence by insisting in its subscriber contracts that it not be revealed as a source of information.[6] (A standard Dun & Bradstreet subscriber contract is appended as Appendix A.) A subscriber who revealed that Dun & Bradstreet was the source of information would be in breach of this contract of silence.[7]

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6. It is ironic that Dun & Bradstreet relies so heavily on First Amendment values, while at the same time placing such strict limitations on the "free flow" of information contained in its reports.

7. The typical Dun & Bradstreet contract contains restrictions such as the following:

> All information furnished hereunder shall be held in strict confidence and shall never be reproduced, revealed or made accessible in whole or in part, in any manner whatsoever to any others unless required by law.
>
> . . . .
>
> Neither Dun & Bradstreet, Inc. nor the Reference Books and/or Directories will be identified by the subscriber as a source reference . . . .

See Appendix ¶¶ 2 & 5, at A-2.

A plaintiff would be hard pressed to establish with any certainty that a false Dun & Bradstreet report was decisive in causing a lost sale, especially if the effect of the Dun & Bradstreet report was indirect (*i.e.*, it caused a pernicious rumor, which in turn affected the final business decision). In fact, in the face of Dun & Bradstreet's contracts of silence, a potential plaintiff might never learn that Dun & Bradstreet had spoken ill of it, much less determine that Dun & Bradstreet was the source of a damaging rumor.[8] The plaintiff also would face tremendous problems in trying to locate or identify lost potential business. One would not know which customers failed to make initial contact because of either a Dun & Bradstreet report, or a rumor whose source was the report.

The doctrine of presumed damages, much like *res ipsa loquitur* in a similar context, helps a plaintiff overcome these formidable difficulties. Indeed, an analogy to *res ipsa loquitur* is particularly appropriate in circumstances involving Dun & Bradstreet reports. Even if a plaintiff cannot directly establish lost sales because of a defamatory report, it is counter-intuitive to assert that such a report by this ubiquitous and highly respected organization is not harmful. Without the presumption of damages, however, a plaintiff which has suffered substantial harm may not reach the jury because of a lack of causal proof. Under these circumstances, the appropriateness of the presumption is clear. *See Developments* at 892 ("The application of such presumptions should depend upon the potentiality of harm to the particular plaintiff from the publication in question . . . .").

In *Gertz* the Court recognized that presumed damages, unlike punitives, are relevant to the state interest of compensating defamed parties. 418 U. S. at 350. Somewhat contradictorily, however, the Court called the presumption "an oddity of tort law" because it "allows recovery of purportedly compensatory damages without evidence of actual loss." *Id.* at 349. While perhaps true in situations involving harm of a

8. This factor alone distinguishes Dun & Bradstreet from the news media.

less tangible nature, this reasoning does not apply to the typical business libel where the injury is real, but proof of causation may be difficult. Additionally, it would be ironic to deny the presumption in light of the Court's statement that "actual damages" may include intangible harm such as mental suffering. 418 U. S. at 350. Causal proof of these type of damages is arguably easier to present than is proof of lost business. *See Time, Inc. v. Firestone*, 424 U. S. 448 (1976). Moreover, the value a jury might attach to these intangible damages is largely unbounded.

The doctrine of presumed damages in a business libel context does not leave a jury with unbridled discretion to award any amount of damages it desires. Damages cannot be based on pure speculation. They must bear some relationship to the injuries sustained. *See, e.g., Maheu* v. *Hughes Tool Co.*, 569 F.2d 459, 474-77 (9th Cir. 1977). Thus, particularly in the context of a business libel, a plaintiff will present evidence either of a decline in profits, or of a failure to achieve expected growth following the defamatory statement.[9] The defendant may challenge these figures or present proof attributing the losses to other factors. The jury must resolve the evidentiary disputes and arrive at a damage calculation. The trial judge is available to ensure that this calculation is supported by the evidence. Therefore, in the business libel context, rather than being merely an "oddity of tort law," presumed damages serve an important function in allowing states to compensate defamed parties.

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9. When "special" damage need not be shown, "general" damage may be recovered. That such damage has been suffered need not be proved by the Plaintiff, for it is presumed, but it is customary to make proof of some of the items. The elements of "general" damage [include] . . . loss of business . . . .

C. McCormick, *Handbook of the Law of Damages* § 116 (1935).

III. The Level of Common Law Protection Afforded Dun & Bradstreet is Adequate and Appropriate.

While Dun & Bradstreet bemoans the disparate treatment it receives under the First Amendment as compared to the media, in reality Dun & Bradstreet was a favorite child of the common law long before this Court introduced the Constitution to the law of defamation. In recognition of the important role credit reports play in the commercial world, the majority of states extend a common law qualified privilege to Dun & Bradstreet reports. *Sunward Corp. v. Dun & Bradstreet, Inc.*, 568 F. Supp. 602, 607 (D. Colo. 1983) (citing cases). The reason for this privilege is that

> [t]hose about to engage in a commercial transaction like to know something about the persons with whom they are dealing. Often they are unable to get that information themselves and must obtain it through mercantile agencies. In furnishing such information, the agencies are supplying a legitimate business need and ought to have the protection of the privilege. Without such protection, few would undertake to furnish the information, and the cost would be high, if not prohibitive.

L. ELDREDGE, *THE LAW OF DEFAMATION* § 86, at 468-69 (1978) (quoting *In re Retailers Commercial Agency Inc.*, 342 Mass. 515, 174 N.E.2d 376, 379 (1961)).[10]

The standard of conduct necessary to overcome the privilege varies slightly from state to state.

> Most require a showing of something more than mere negligence to defeat the privilege. To prevail, a

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10 Several courts, including the Vermont Supreme Court in the present case, have questioned the wisdom of the reasoning underlying the privilege. *See, e.g., Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973). This Brief will not pursue this dispute. Note, however, that Professor Eldredge feels that cases such as *Hood* "should lead some other courts to reconsider their present rule in this situation." L. ELDREDGE, *supra* p. 9, § 86, at 469 n. 70.

> plaintiff generally must show the credit agency was reckless in conducting its investigation. Bad faith, intent to injure, or ill-will also defeat the privilege.

R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 308 (1980) (footnotes omitted). *See* Annot., *Sufficiency of Showing of Malice or Lack of Reasonable Care to Support Credit Agency's Liability for Circulating Inaccurate Credit Report*, 40 A.L.R. 3d 1049 (1971). Although a court might refer to the standard as "reckless disregard for the truth," recklessness is often defined in the common law sense of "wanton and reckless disregard of the circumstances," rather than as defined by the Court in *St. Amant v. Thompson*, 309 U. S. 727 (1968) ("reckless disregard" defined as subjective doubt about the truth). *See, e.g., Roemer v. Retail Credit Co.*, 3 Cal. App.3d 368, 83 Cal. Rptr. 540, 542 (1970). *See also Cantrell v. Forest City Publishing Co.*, 419 U. S. 245, 250 n.3 (1974) (in a "false-light" case, trial court required reckless disregard for truth, but defined "recklessly" as "wantonly, with indifference to consequences"); *Williams v. Burns*, 463 F. Supp. 1278, 1283 (D. Colo. 1979) (discussing showing necessary to overcome a qualified privilege under Colorado law). Similarly, a showing of "malice" might overcome the privilege. This is not necessarily "malice" in the sense of ill-will, or "actual malice" as defined by this Court. Neither is it malice implied solely from the defamatory statement itself. Rather "[m]alice . . . can consist of an unreasonable and wrongful act done intentionally, without just cause. . . . Malice may be inferred in the situation where the defendant has no reasonable basis for believing that the statement is true. This would be the case where there had been a failure to make an adequate investigation." *Brown v. Shaggs-Albertson's Properties, Inc.*, 563 F.2d 983, 986-87 (10th Cir. 1977) (applying Oklahoma law and citing *Oberman v. Dun & Bradstreet, Inc.*, 460 F.2d 1381 (7th Cir. 1972)). Regardless of the exact definition of "reckless" or "malice", a high degree of culpability on the part of Dun & Bradstreet is a predicate to liability. Therefore, in the majority of states Dun & Bradstreet is subject neither to liability

without fault nor liability based on simple negligence.[11] Since presumed damages are irrelevant absent basic liability, Dun & Bradstreet need not worry about these damages except when its conduct is highly culpable.[12]

The type of conduct that causes Dun & Bradstreet to lose its privilege — recklessness or maliciousness — is seated in well-developed concepts of tort law,[13] which are arguably easier for the average juror to grasp than is the concept of "actual malice." *See* Hunter, *A Reprise on* Herbert v. Lando *and the Law of Defamation*, 71 Ky.L.J. 569, 574-77 (1982-1983). The facts of this case demonstrate that these tort concepts are better suited for evaluating Dun & Bradstreet's conduct than is the subjective inquiry mandated by *St. Amant* and *Herbert* v. *Lando*, 441 U.S. 153 (1979). Here, Dun & Bradstreet issued a report based on information from an untrained high school student without any verification of the information. Yet Dun & Bradstreet blithely asserts in its brief that no "reckless disregard for the truth" existed because no one questioned the good faith of Dun & Bradstreet's teenage reporter. In the *Sunward* case, the Dun & Bradstreet reporter described the information in the reports as "guesstimates." These guesstimates portrayed Sunward as a company with annual sales,

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11. In *Gertz* the Court emphasized the potential chilling effect of liability without fault. 418 U.S. at 346. Because of the common law privilege, this concern is inapplicable to Dun & Bradstreet credit reports.

12. The applicability of presumed damages will also depend on whether the statement is libelous per se, or, in most states, on whether the statement would have been slanderous per se if spoken. In other words, Dun & Bradstreet is subject to presumed damages when a report is libelous on its face, or, in those states that have incorporated the four "slander per se" categories into their law of libel, when a report would tend to injure a plaintiff in his trade or business. *See generally* R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* 96-98 (1980).

13. This is not to suggest that these concepts are free from doubt in the abstract. *See Smith* v. *Wade*, 51 U.S.L.W. 4407 (U.S. Apr. 20, 1983). They are, however, given meaning by their development in the tort law of each state. *See, e.g., Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450, 457, *cert. denied*, 423 U.S. 1025 (1975) ("term 'reckless disregard' has had rather frequent usage in the tort field in this state").

according to Dun & Bradstreet, of less than $1 million, when in fact sales approached $30 million. Dun & Bradstreet fails to suggest why the Constitution should protect its recklessly indifferent behavior. In fact, the Court's commercial speech cases suggest that the Constitution does not prohibit the states from reaching conduct likely to produce such inaccurate information.

IV. Credit Report "Speech" Requires Less Protection Than Does Other Speech.

Under the common law of most states, Dun & Bradstreet must be reckless or malicious before it feels the potential chill brought on by presumed damages. This Brief now turns to the question of whether the Constitution mandates an even higher level of culpability before the states can allow presumed damages. This question will be addressed within the context of the kind of speech in which Dun & Bradstreet engages. When protection of commercial speech is balanced against the states' legitimate interest in allowing presumed damages, the conclusion must be that the common law provides Dun & Bradstreet with adequate protection and that constitutional intervention on the part of this Court is unwarranted.

Approximately two years after *Gertz*, the Court extended constitutional protection to commercial speech. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). The Court distinguished then, and has continued to distinguish, commercial speech from other speech. *See, e.g., Central Hudson Gas and Electric Co.* v. *Public Service Commission*, 447 U.S. 557 (1980). Justice Powell's opinion in *Virginia State Board* noted that, because of its economic nature and ease of verification, commercial speech is less subject to self-censorship than other speech. 425 U.S. at 772 n.24. *See also Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 462 n.20 (1978) (in rejecting application of overbreadth doctrine to commercial speech, the Court stated that "[c]ommercial speech is not as likely to be deterred as noncommercial speech . . . ."). In

fact, Justice Powell noted that the protections set forth in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), might be unnecessary for commercial speech, and specifically compared *New York Times* with a case in which Dun & Bradstreet was a party, *Dun & Bradstreet, Inc.* v. *Grove*, 404 U.S. 898 (1971) (denying cert.). The Court has reaffirmed the distinctive nature of commercial speech in more recent cases. *See, e.g., Hudson Gas*, 447 U.S. at 564 n.6.

Justice Powell's general analysis of commercial speech fits perfectly in the specific context of Dun & Bradstreet reports. First, these reports are undeniably commercial speech. *See Millstone* v. *O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976) (opinion by Justice Clark). They are about businesses, and are distributed to a limited audience that pays for the reports. They assist that audience in evaluating commercial transactions. *See generally Hudson Gas*, 447 U.S. at 561-62. Second, the information in a typical Dun & Bradstreet report is easy to verify. The reports concern sales figures, payment habits, financial status and the like. Each of these matters tends to be a black or white fact. Moreover, Dun & Bradstreet has an elaborate system for obtaining and verifying these facts.[14] Third, Dun & Bradstreet's financial status and the extent of its distribution system reveal the economic hardiness of its reports. Dun & Bradstreet is a multi-million dollar enterprise (its net income in 1982 was $34,249,000), supplying information on "over 4.5

14. In cases in which Dun & Bradstreet follow its own training, supervision, and verification procedures, a plaintiff would be hard pressed to establish the degree of culpability necessary for a finding of liability. Unfortunately, these procedures were not followed in the instant case. Similarly, Dun & Bradstreet failed to follow its own third-party verification requirements in the *Sunward* case. Note, however, that Dun & Bradstreet in *Sunward* did follow its procedure of issuing prompt notice to subscribers upon notification of an error in its reports. The trial judge relied heavily on this fact in refusing to submit the issue of punitive damages to the jury, and in submitting an instruction regarding mitigation of damages.

million" businesses to over 80,000 subscribers.[15] Any argument by Dun & Bradstreet that it needs constitutional protection or else its voice will be chilled flies in the face of this reality. In fact, even in states that refuse to extend a common law privilege to credit reporting agencies, Dun & Bradstreet appears to be thriving. *See Hood* v. *Dun & Bradstreet, Inc.*, 486 F.2d 25, 32 (5th Cir. 1973), *cert. denied*, 415 U.S. 985 (1974). Moreover, Dun & Bradstreet is in a superior position compared to defamed plaintiffs to absorb the societal harm its reports cause. Dun & Bradstreet can spread its costs among its many subscribers.

These basic distinctions suggest a more fundamental reason why the protections of *Gertz* and *New York Times* should not apply to credit reports. The usefulness of commercial speech is directly tied to its accuracy. *Hudson Gas*, 447 U.S. at 563. Unlike false information concerning public issues, *see New York Times*, 376 U.S. at 279 n.19, inaccurate commercial speech has no redeeming value whatever. Not only is accuracy important for the businesses on which Dun & Bradstreet reports, it is important to Dun & Bradstreet's subscribers. Given this need for accuracy on the part of all concerned parties, Dun & Bradstreet's argument that application of *Gertz* is necessary to avoid self-censorship is untenable. No societal goal is served in allowing Dun & Bradstreet to put forth defamatory material maliciously or after a grossly inadequate investigation.

Dun & Bradstreet will no doubt respond that the argument of Amicus Curiae is "content based." In its decisions developing the commercial speech doctrine, however, the Court has recognized "the 'commonsense' distinction" between commercial speech and other varieties of speech. *Hudson Gas*, 447 U.S. at 562. In fact, "[i]f commercial speech is to be distinguished, it 'must be distinguished by its content.' " *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 504 n.11 (1981) (quoting *Virginia State Board*, 425 U.S. at

15. This information is derived from documents supplied to Sunward Corporation by Dun & Bradstreet during discovery.

761). [16] While the problems inherent in content regulation might apply to other speakers in other contexts, they are not applicable to commercial speakers such as Dun & Bradstreet. Moreover, in examining commercial speech, the Court has stated that the two features of commercial speech noted above — economic hardiness and ease of verification — permit regulation of its content. *Id.* at 564 n.6. In fact, in *Ohralik* v. *Ohio State Bar Association*, 436 U.S. 447, 462-66 (1978), the Court rejected an argument that actual injury was necessary before a state could regulate an attorney's commercial speech. The Court noted that the state interest in prohibiting the dangers inherent in attorney solicitation justified a prophylactic rule, regardless of whether actual injury occurred. Similarly, the great likelihood that a defamatory credit report will cause harm, accompanied by the difficulty in linking that harm to the report, justifies a state in allowing presumed damages.

The type of speech in which Dun & Bradstreet engages is fundamentally different from the speech that spawned *New York Times* and its progeny. *Gertz* expressed a fear that juries might use presumed damages to punish unpopular speech. 418 U.S. at 349. This possibility is not likely to occur in a situation involving Dun & Bradstreet. The topics on which Dun & Bradstreet speaks are not controversial topics likely to draw a jury's ire. As demonstrated above, presumed damages are based on compensating the plaintiff, and the jury is so

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16. Content, however, is not all that distinguishes commercial speech. The audience and purpose behind the speech are also critical. For example, Dun & Bradstreet asks why a distinction should be drawn between information it provides, and the same information published in a newspaper. Petitioner's Brief 29. The newspaper is providing newsworthy information to the general public. Dun & Bradstreet is providing its subscribers with information for the purpose of evaluating commercial transactions. The latter is the essence of commercial speech as discussed in *Hudson Gas*. It is less subject to self-censorship than is the newspaper report.

instructed.[17] If Dun & Bradstreet is recklessly indifferent in its investigation or acts maliciously, then forcing it to pay for this conduct should not be deemed unconstitutional.

The law of defamation, while undoubtedly complex, has gradually evolved in the states. Influenced by the reasoning of *New York Times* and its progeny, it continues to do so. The Court should resist the urge to interfere with this process, especially when premised on such broad-based arguments as those presented by Dun & Bradstreet. Although certain doctrines may be arcane or based on little more than historical accident, this is not the case with the law regarding defamatory credit reports. State and lower federal courts, as well as Congress, are addressing the issues with modern reasoning and responses. They should be allowed to continue to seek the best balance between the competing interests involved. Dun & Bradstreet's position, divorced as it is from the facts, should be rejected.

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17. Contrast this with punitive damages where the jury is instructed that the purpose of these damages is to punish the defendant and deter future misconduct. Even here, however, the focus is on the defendant's conduct rather than its speech.

CONCLUSION

Based upon the foregoing, Amicus Curiae Sunward Corporation respectfully requests the Court to affirm the judgment of the Vermont Supreme Court.

Dated this 20th day of January, 1984.

Respectfully submitted,

/s/ William E. Murane

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The undersigned subscriber hereby employs Dun & Bradstreet, Inc. to furnish information on businesses in the geographic area covered by the Reference Books leased hereunder for the term beginning _____, 19____, and ending _____, 19____, and agrees to pay in advance for:

BASIC SERVICE

_____ Response Units* and Reference Books CHECKED FOR AREA NUMBER _____

☐ WINTER (January) 19____ ☐ SPRING (March) 19____ ☐ SUMMER (July) 19____

☐ FALL (September) 19____ ☐ ADVANCE SUMMER (May) 19____

☐ ADVANCE WINTER (November) 19____ $_____

Response Units Above Basic Service

_____ Response Units @ $10.55 each ..... $_____

Less Discount @ $370.00 per 100 ..... $_____ $_____

For additional Response Units requested, the subscriber agrees to pay on demand at the rate of $10.55 each.

*Dun & Bradstreet's written response (based on information in-file) to a subscriber's inquiry on a business located in the continental United States (excluding Alaska) furnished by mail is valued as one response unit.
The additional response unit values of certain other services appear on the "Schedule of Additional Services" below.
Of the total sum shown, $10.00 is in payment of an Annual Subscription to the magazine "Dun & Bradstreet Reports." If not desired, $10.00 may be deducted. Additional subscriptions $10.00 each.

DUNS DIAL SERVICE*

_____ DUNS DIAL Response Units @ $885.00 per 100
Less Discount @ $287.00 per 100 $_____

For additional DUNS DIAL Response Units requested, subscriber agrees to pay on demand at the rate of $6.85 each.

*DUNS DIAL is an optional telephone service for subscribers desiring immediate information in addition to the written report provided (and charged for) under Basic Service.
Values of available DUNS DIAL services are shown below under Schedule of DUNS DIAL SERVICES.

DUNS FINANCIAL PROFILE REPORTS

_____ DUNS FINANCIAL PROFILE REPORTS-OPTION A
(minimum order of 50 reports, additional reports in blocks of 50)
at the following rate:

_____ $20. per report, first 100 $_____

_____ $15. per report, over 100 $_____

Excess rate $30. each report Total Option A $_____

Option B or C: Special selection order form attached ☐

SALES DEVELOPMENT, INDUSTRY REFERENCE BOOKS AND OTHER SERVICES

☐ Sales Lead Service (Area _____) $_____

☐ Reference Book of Transportation ☐ SPRING...19____ ☐ FALL...19____ $_____

☐ Reference Book of Manufacturers ☐ SPRING...19____ ☐ FALL...19____ $_____

☐ Apparel Trades Book ☐ FEBRUARY ☐ MAY ☐ AUGUST ☐ NOVEMBER $_____

☐ Change Notification Service } SPECIAL SELECTION BASIC ORDER FORM ATTACHED $ XXXXX

☐ Exception Credit Update Service } $ XXXXX

☐ (designate) _____ $_____

SUB-TOTAL FOR SALES DEVELOPMENT, INDUSTRY REFERENCE BOOK AND OTHER SERVICES... $_____

TOTAL $_____

SCHEDULE OF ADDITIONAL SERVICES

Business Information Reports	Additional Response Unit Value
On businesses located in Alaska	1
On businesses located in Hawaii	½
On businesses located in Puerto Rico	1½
On businesses edited in Analytical format	0
With Continuous Service	½
On businesses not in-file	0

SCHEDULE OF DUNS DIAL SERVICES

	DUNS DIAL Response Unit Value
To access and search file	¼
To provide key points read-out	1
To provide full report read-out	2
To provide One-way Priority Service	2
To provide Two-way Priority service	3
To provide P D Q investigation and response	8

The listed values are subject to change upon 30 days notice. Please contact your Dun & Bradstreet representative for information on other available services.

IMPORTANT Dun & Bradstreet, Inc. and the undersigned subscriber, by signing this Subscription Agreement, agree to and intend to be bound by the terms hereof including the Terms of Agreement on the reverse side, which are made a part of this subscription.

Accepted

Dun & Bradstreet, Inc.

76-24(7904151)

By .....

Name of Subscriber ..... Date .....

Authorized Signature ..... Title .....

Mailing Address .....

City ..... State ..... Zip .....

APPENDIX A

TERMS OF AGREEMENT

1. All information on businesses furnished to the subscriber by Dun & Bradstreet, Inc. pursuant to this Agreement is for the exclusive use of the subscriber solely as one factor in the subscriber's credit, insurance, marketing or other business decisions relating to corporations, partnerships, sole proprietorships or other business, government or non-profit entities or such entities' stockholders, directors, officers, partners, proprietors or employees in their capacities as such. It is expressly prohibited to use such information as a factor in establishing an individual's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment.

2. All information furnished hereunder shall be held in strict confidence and shall never be reproduced, revealed or made accessible in whole or in part, in any manner whatsoever to any others unless required by law. Any question concerning such information should be referred to Dun & Bradstreet, Inc. for verification and/or review with the subject of same. It is expressly understood that the subscriber shall neither request information for the use of others, nor permit requests to be made under this subscription by others.

3. Because of the large number of informational sources upon which Dun & Bradstreet, Inc. must rely, and over which Dun & Bradstreet, Inc. has no control, the subscriber acknowledges that Dun & Bradstreet, Inc. does not and cannot guarantee or warrant correctness or completeness of information furnished. Such information is to be considered current within Dun & Bradstreet, Inc.'s established procedures for revision of same and usually is not the product of independent investigation prompted by each customer inquiry. It is further understood by the subscriber that every business decision, to some degree or another, represents the assumption of a risk, and that Dun & Bradstreet, Inc., in furnishing information, does not and cannot underwrite the subscriber's risk, in any manner whatsoever. Dun & Bradstreet, Inc., therefore, shall not be liable for any loss or injury caused in whole or in part, either by its negligent acts of omission or commission or those of its officers, agents or employees or by contingencies beyond its control, in procuring, compiling, collecting, interpreting, reporting, communicating or delivering information, including, but not limited to, information contained in responses to subscriber's inquiries, Reference Books, Apparel Trades Books, and/or Directories.

4. This Agreement covers service to the subscriber at only a single place of business, unless otherwise stated, and all of the Reference Books and/or Directories loaned at any time shall be kept and used only at the single place of business specified in this subscription, except that the subscriber after first obtaining written permission and complying with written instructions given by Dun & Bradstreet, Inc. may furnish the Reference Books and/or Directories to another to have all or part of the listings copied or duplicated in punched card or other form suitable for further handling or processing for the exclusive use of the subscriber. The Reference Books and/or Directories shall be returned to Dun & Bradstreet, Inc. forthwith without further notice upon receipt by the subscriber of any subsequent edition thereof or at the expiration or termination of this subscription.

5. Neither Dun & Bradstreet, Inc. nor the Reference Books and/or Directories will be identified by the subscriber as a source reference unless required by law or except upon obtaining written permission from Dun & Bradstreet, Inc., which, without in any way limiting the foregoing, reserves the right, in its absolute discretion, to verify the accuracy of any quotation or statement derived from information obtained from Dun & Bradstreet, Inc. under this subscription.

6. If the cost of serving the subscriber under this agreement is increased as a result of measures prescribed by government authority or by any other cause, then the terms of this agreement for its unexpired period may be revised by Dun & Bradstreet, Inc. to such extent as in its judgment may be necessary to cover the increased costs. In such event, however, the subscriber shall have the option of continuing the agreement on the revised basis, or of discontinuing the service and upon such discontinuance, Dun & Bradstreet, Inc., shall be obligated to refund the unearned portion of any consideration paid by the subscriber under this agreement.

7. This Agreement is not binding upon Dun & Bradstreet, Inc. until accepted by it. Dun & Bradstreet, Inc. hereby reserves the right to terminate this Agreement upon thirty (30) days written notice, with or without reason, in which event it shall be obligated to refund the unearned portion of any consideration paid by the subscriber under this Agreement.

8. If the terms of payment are otherwise than in full in advance, then if any payment provided for is not made when due the whole amount shall immediately become due and payable. Delivery charges and applicable taxes are not included in the Total on the face of this Agreement, and will be invoiced to the subscriber.

9. The rights and obligations of the parties to this Agreement apply from the date of signing to all information, including Reference Books and/or Directories, furnished at any time to the subscriber, whether relating to concerns located within or without the geographical area encompassed by such publications. This written Agreement contains the entire and only Agreement between the parties regarding the subject matter hereof and there are merged herein all prior and collateral representations, promises and conditions. Any representation, promise, guarantee or condition not incorporated herein shall not be binding upon either party. No waiver, or amendment of this Agreement shall be binding on the parties unless in writing, signed by an authorized official of Dun & Bradstreet, Inc. and the subscriber.

10. The above Terms of Agreement apply to the furnishing to the subscriber by Dun & Bradstreet, Inc. of any kind of information on businesses and any kind of business information service, whether or not specifically referred to in this Subscription Agreement and whether or not furnished at additional cost to the subscriber and whether or not currently being furnished by Dun & Bradstreet, Inc. to its subscribers.

Business _____ *SIC #* _____

Telephone # _____ *Subscriber #* _____

Signing this Agreement _____ *Title* _____

Tax Exemption # _____